AUSTRALIAN CHAMBER OF COMMERCE AND INDUSTRY

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12 September 2012

Committee Secretary
Senate Standing Committee on Education, Employment and Workplace Relations
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dear Sir/Madam

Protecting Local Jobs (Regulating Enterprise Migration Agreements) Bill 2012

The Australian Chamber of Commerce and Industry, Australia's largest and most representative business organisation, takes this opportunity to provide a response to the Protecting Local Jobs (Regulating Enterprise Migration Agreements) Bill 2012 (the Bill).

The Australian business community, including the resources sector, create wealth and jobs for the Australian population, enables infrastructure development in regional centres and attracts investment in Australia.

The Australian Chamber of Commerce and Industry has been very active in promoting workforce participation, labour mobility and upskilling of existing workers to meet skills and labour demands present across the Australian labour market. ACCI recognises that skilled migration acts as an important link in the human capital needs of Australian industry, serving as a stop-gap measure when the local labour force cannot meet the skills and labour demands of employers.

ACCI believes that the proposed Bill amending the Fair Work Act 2009 *and the* Migration Act 1958 presents an unnecessary duplication of existing conditions on Enterprise Migration Agreement applicants, seeks to duplicate existing services already in place in industry and adds an additional layer of bureaucratic and political oversight that could potential deter investment in the Australian resources and construction sectors.

Enterprise Migration Agreements (EMAs) will be solely used for the development of new large scale projects in the resources sector. Traditionally, these projects have a high labour demand in the initial construction phase before moving on to a less human capital intensive production phase. Low labour mobility within Australia presents a significant barrier to meeting high labour demand during construction. The primary benefit of EMAs is their ability to provide the skills and labour needs in the short term in new developments before a largely local workforce is engaged in the production phase.

ACCI believes that the proposed amendments represent a simplistic view of labour demand and supply in Australia. Most resources development projects are occurring at considerable distance from major metropolitan

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centres and, in many cases, from regional centres. Regional workforces have shrunk considerably in recent years due to migration of the regional workforce to major regional and metropolitan areas where, in the past, there has been greater opportunity for education and employment. Conversely, those in major regional and metropolitan areas are often reluctant to leave the services and amenity readily afforded in urban areas.[1]

As such, the limited mobility of the Australian labour market means that job losses in the South Eastern Australian manufacturing and services sectors do not automatically translate into a boost in the available workforce for resources projects and major infrastructure developments in the northern and western parts of Australia. Endemic and systemic issues in the Australian labour market and across the Australian workforce more broadly often prevent workers from undertaking significant relocations for employment, especially where the employment opportunities are short term, living conditions are not conducive to family relocation and there is little access to services and amenities, as is often the case with new resources developments in their construction phase.

Many of the proposed conditions outlined in proposed s536B of the Bill duplicate conditions already in place and outlined in the guidelines for EMAs produced by the Department of Immigration and Citizenship.

The guidelines specify that to be approved for an EMA, a project owner or prime contractor will need to demonstrate:

- why sufficient Australian workers cannot be found to fill anticipated vacancies in semi-skilled occupations, including labour market analysis
- consultation with relevant stakeholders on labour market needs and the training of Australians
- commitment to ongoing local recruitment efforts; and
- commitment to training and social inclusion targets for the project.

The proposed conditions outlined in the Bill represent an unnecessary duplication of existing guidelines and create an additional layer of bureaucratic and political oversight that may cause significant delays in processing time, causing project delays and increasing costs for the developer.

The *Local Jobs board,* outlined in proposed s140ZKC(2) places responsibility for the maintenance of the Jobs Board with the Workplace Relations Minister. For some considerable time, the resources sector, led by the Australian Mines and Metals Association, has maintained a highly successful jobs board that has provided employers and potential employees with a

[1] Buchanan et al, 2011, *Understanding and Improving Labour Mobility*, NCVER

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medium to advertise and locate potential opportunities for employment in the resources sector.

ACCI believes that a new Local Jobs Board would struggle to gain the reputation and following of the existing service. It is in the best interests of the resources industry and the Australian community more broadly, to have in place a service with proven following and usability, maintained by the industry it services.

Current government jobs boards such as jobsearch.gov.au have struggled to maintain relevance in the current jobs market and are generally considered as a fringe product, rarely used by employers.

ACCI through its recent submission to the Australian Government on a National Career Development Strategy, has welcomed strategic leadership and supported a holistic approach to career and job information including a "clearance house" approach to better facilitate the passage of information on careers and opportunities for training and employment which will build on, and link to, existing and well utilised channels. However, it is neither necessary nor appropriate to use the Fair Work Act 2009 or the Migration Act 1958 to facilitate this.

The Bill would significantly amend the *Fair Work Act 2009* and create unintended consequences, particularly when the primary subject matter to be regulated is dealt with under other legislation in the form of the *Migration Act 1958*. Under the most recent Administrative Arrangements Order signed by the Governor-General on 9 February, the Minister for Immigration and Citizenship is responsible for the latter Act, whereas the Minister for Employment and Workplace Relations is responsible for administering the former. It is unclear how the provisions can operate with two primary decision makers needing to be satisfied of certain matters before making a decision where one Minister's statutory jurisdiction is enlivened only when another Minister is satisfied of certain pre-conditions. Where a participant is aggrieved by a decision, this could be agitated with different forms of judicial or tribunal review given that appeals under the *Fair Work Act 2009* are not consistent with appeals under the *Migration Act 1958.* These unintended consequences would create uncertainty for those participants involved in the EMA scheme, which is intended to provide a level of certainty to participants and large scale projects. The two legislative frameworks are distinctive as they have different policy objectives and there is currently no similar or analogous provision which involves the *Fair Work Act 2009* regulating aspects of the *Migration Act 1958* or vice-versa.

As the Government has already articulated, workers from outside Australia employed under the EMA framework will already be protected by the same laws that protect and govern the employment relationship of other workers at federal and state / territory levels. Workers from outside Australia

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sponsored under an EMA will hold 457 visas and will be subject to the *Worker Protection Act 2009*.

There are also a range of technical issues associated with a number of amendments, particularly under clause 4 of the Bill. Clause 4 would require the relevant Minister to be satisfied that the EMA participant has complied and will comply with *"workplace laws"*, which under s 12 of the *Fair Work Act 2009* includes that Act, and *"any other law of the Commonwealth, a State or a Territory that regulates the relationships between employers and employees (including by dealing with occupational health and safety matters)"*. Proposed s536A would impose an impossible statutory obligation on the Minister for Employment and Workplace Relations, by requiring the Minister not to agree to the making of an EMA unless the Minister is satisfied that the EMA participant has complied with and will continue to comply with relevant workplace laws. ACCI has concerns with this proposal for two main reasons. Firstly, it would be impossible for the Minister to be satisfied that the participant has complied with all relevant laws, and secondly, it is unclear how the Minister could ever be satisfied as to the existence of a jurisdictional fact ie. the requirement that a participant *will* comply with relevant workplace laws in futuro. The Committee should also note that *Fair Work Act 2009* has recently been the subject to a two year post-implementation review and the Government has yet to announce its response to the recommendations. These issues were not canvassed, to the knowledge of ACCI, in any submissions to the Review Panel.

Enterprise Migration Agreements provide a dynamic approach to short term human capital needs in major resource development projects, ensuring a balance in the supply of labour between domestic and overseas workers, based on the capability of the existing workforce. The amendments to the Fair Work Act 2009 and the Migration Act 1958 are strongly opposed, are not necessary and have the potential to jeopardise future resource development projects in Australia.

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